Tue Sep 06 10:56:59 EDT 2016
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Fw: Request for Reconsideration and Request for Administrative Stay - Docket ID No. EPA-R08-OAR-2015-0463
To: CMS.OEX@epamail.epa.gov

From: Lawson, Bill <Bill.Lawson@pacificorp.com>
Sent: Friday, September 2, 2016 3:44 PM
To: Mccarthy, Gina; R8EISC
Cc: Jenkins, Michael; Blaine Rawson
Subject: Request for Reconsideration and Request for Administrative Stay - Docket ID No. EPA-R08-OAR-2015-0463

Please find attached PacifiCorp's Request for Reconsideration and Request for Administrative Stay of EPA's Final Rule: "Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule." Docket ID No. EPA-R08-OAR-2015-0463

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September 2, 2016

Via E-Mail and Overnight Mail

The Honorable Gina McCarthy
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Shaun McGrath
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Re: Request for Reconsideration and Request for Administrative Stay of EPA's Final Rule: "Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze; Final Rule." Docket ID No. EPA-R08-OAR-2015-0463

Dear Administrators McCarthy and McGrath:

PacifiCorp respectfully requests that the U.S. Environmental Protection Agency ("EPA" or "Agency") reconsider and grant an immediate administrative stay of the compliance deadline and toll the effective date of certain requirements in the Agency's final rule cited above. 81 Fed. Reg. 43894 (July 5, 2016) ("Final Rule"). Specifically, PacifiCorp requests EPA reconsider and administratively stay the best available retrofit technology ("BART") requirements related to nitrogen oxide (NO_x) emission control equipment ("BART NO_x FIP") at PacifiCorp's Hunter power plant (Units 1 and 2) and Huntington power plant (Units 1 and 2) ("collectively Utah BART Units). PacifiCorp also requests EPA reconsider its disapproval of Utah's regional haze state implementation plan.

As the majority owner and operator of Hunter Units 1 and 2, and the owner and operator of Huntington Units 1 and 2, PacifiCorp will be forced to begin spending

millions of dollars (a total of **over one half billion dollars** of capital costs by EPA's estimate) to prepare to install selective catalytic reduction ("SCR") systems required under the BART NO_x FIP —expenditures that would be wholly unnecessary if PacifiCorp's legal challenges to the BART NO_x FIP are successful. Because these legal challenges are based on sound legal principles and are likely to succeed on the merits, and because a stay is in the public interest and necessary to prevent irreparable harm to PacifiCorp and PacifiCorp's customers, EPA should grant PacifiCorp's stay request. In contrast, no significant harm will result to either EPA or the public from a stay of the Final Rule – particularly because many of the emission reductions and resulting visibility improvements contemplated under the Final Rule already are in place as required by the Utah SIP, and the Final Rule does not require further emission reductions until 2021.

PacifiCorp is likely to succeed on the merits because the BART NO_x FIP is contrary to applicable law. First, EPA improperly rejected the State of Utah's regional haze state implementation plan ("Utah RH SIP"). Second, EPA failed to conduct an adequate statutory five-factor BART analysis to justify SCR for the Utah BART Units, and EPA has taken contradictory positions regarding the results of the BART analysis it did conduct. Not only do EPA's analysis and BART NO_x FIP disregard the Congressional mandate that states have the primary role in designing regional haze programs, they undermine the State of Utah's goal of improving visibility at a reasonable and responsible pace without causing unnecessary economic distress from higher electricity rates. EPA's rejection of the Utah RH SIP and imposition of the BART NO_x FIP are also inconsistent with EPA's BART determinations in other states.

PacifiCorp thus requests EPA to grant an immediate stay of the BART NO_x FIP and to reconsider its rejection of the Utah RH SIP and BART Alternative. PacifiCorp respectfully requests EPA act on this application by September 29, 2016. PacifiCorp will treat EPA's failure to act on this application by that date as a constructive denial of its request for stay.

I. Background

I.A. PacifiCorp's BART-eligible units in Utah.

PacifiCorp, which operates in Utah under the business name Rocky Mountain Power, supplies electricity to more than 1.8 million residential and business customers in the state of Utah and five other western states. As stated, PacifiCorp owns, in majority or whole, and operates the Utah BART Units.[1] PacifiCorp also owns a third unit at the Hunter plant, which is not BART-eligible, and is the owner of the Carbon plant, which closed in 2015. The Utah BART Units are the only sources in the state that Utah and EPA have determined to be subject to the Clean Air Act's ("CAA" or "the Act") BART requirements. As a result, the State of Utah, PacifiCorp and PacifiCorp's customers will

[1] Deseret Generation & Transmission Cooperative, Utah Associated Municipal Power Systems, and Utah Municipal Power Agency are co-owners of, and receive a portion of, the electrical output from certain affected units at the Hunter power plant. As a result, these entities and their customers will be similarly impacted by the Final Rule. The Huntington power plant is wholly owned and operated by PacifiCorp.

be uniquely and directly affected by EPA's final action regarding BART determinations in the Utah RH SIP.[2]

I.B. The NO_x history of the Utah BART Units.

The State of Utah has consistently submitted timely RH SIPs as required by the CAA. EPA, on the other hand, has not fulfilled its statutory duty to approve or disapprove these SIPs by hard deadlines established in the Act. *See* 42 U.S.C. § 7410(k)(1)(B) (requiring EPA to issue a finding of completeness within 60 days of a SIP submittal) and 7410(k)(2) (requiring EPA to issue a decision approving or disapproving the SIP within 12 months of finding a submission complete). Utah submitted RH SIPs in 2003 and 2008 that EPA failed to act on. As required by the CAA (42 U.S.C. § 7410(a)(2)), a Utah SIP becomes state law upon approval by the Utah Air Quality Board ("Board"), which is a necessary step before the SIP can be submitted to EPA. Thus PacifiCorp was, and is, legally bound by a Board-approved RH SIP even though EPA may never act on or approve that SIP.

The State of Utah submitted a RH SIP in 2003 (four years before EPA's deadline) and a revision in 2008 with requirements to make reasonable progress towards natural visibility in national parks and other similarly protected areas within its borders. *See* 42 U.S.C. § 7491. Utah's RH SIP revision in 2008 included NO_x BART determinations for the Utah BART Units. While EPA submitted comments to Utah on the NO_x BART determinations during the State comment process (to which the State responded in the final version), EPA did not act within the statutory deadlines to approve or disapprove the 2008 RH SIP submission as required by the CAA. In fact, EPA waited approximately four years before taking formal action on the 2008 RH SIP submittal. However, because the SIP submission became Utah law in 2008 (through amendments to Utah's State Implementation Plan, Section XX, Regional Haze, which were incorporated into state law through R307-110-28), PacifiCorp was legally required to install low NO_x burners and separated over-fire air ("LNB/SOFA" or "2008 BART Controls") on the Utah BART Units, which it did from 2009-2014.

Utah submitted additional RH SIP revisions to EPA on December 20, 2010 and May 26, 2011. The 2010 revisions clarified the NO_x BART determinations, while the 2011 submittal contained minor revisions related to the SO_2 BART Alternative SO_2 trading program. In the interim, EPA had been sued by WildEarth Guardians over its failure to act on Utah's 2008 RH SIP submission. EPA settled this suit with WildEarth Guardians through a consent decree, which required EPA to act on the 2008 Utah RH SIP by April 30, 2012.[3] Acting to meet this deadline, but over Utah's and PacifiCorp's objections, EPA disapproved the State's BART determinations for NO_x and PM_{10}, while approving an SO_2 BART Alternative, the SO_2 backstop trading program. 77 Fed. Reg. 74355 (Dec. 14, 2012). EPA did not issue a FIP at this time. In response, Utah worked

[2] References to the Utah RH SIP include all supporting documents.

[3] EPA incorrectly portrayed the 2011 SIP revisions as replacing the 2008 RH SIP, including the BART NO_x determinations in its 2016 Proposed Rule. However the BART NO_x determinations were only clarified, not replaced, by the 2011 SIP revisions. *See* 81 Fed. Reg. 2004, 2012 (Jan. 14, 2016).

closely with EPA to find a solution that would meet the applicable requirements of the CAA and satisfy EPA demands for the NO_x BART.

Based on more than ten years of working collaboratively with both EPA and a Regional Planning Organization ("RPO") overseen by EPA, Utah has developed considerable knowledge and data regarding the most effective way to achieve greater "reasonable progress" at the Class I areas in Utah. Building on this expertise and local knowledge, and in close consultation with EPA, Utah submitted a revised RH SIP in 2015 – again at the request of EPA – which included extensive analysis supporting a BART Alternative for NO_x that would achieve greater reasonable progress than the most stringent BART option of SCR. The submission also provided an updated BART determination for PM_{10}. At EPA's request, Utah submitted an additional RH SIP revision on October 20, 2015, with additional measures to ensure that the SO_2 emission reductions for the BART Alternative were accurately and transparently accounted for. EPA requested this additional RH SIP so that a potential obstacle to approval of the BART Alternative – that SO_2 emission reductions under the BART Alternative might be double counted – would be removed. EPA further commented on the BART Alternative for NO_x during the state rulemaking phase with the goal of helping Utah make sure that the BART Alternative met applicable CAA requirements.[4] As a result, Utah's determination that the BART Alternative would achieve greater reasonable progress represented extensive public involvement (including extensive involvement by EPA) through Utah's public hearings and comment period.

After this lengthy history and close collaboration, EPA chose to issue a confusing and contradictory bifurcated proposed rule, where EPA found Utah's weight-of-evidence analysis for the BART Alternative simultaneously to be both adequate and inadequate to meet the requirements of the CAA. EPA, Utah RH SIP Proposed Rule, 81 Fed. Reg. 2004 (Jan. 14, 2016) ("Proposed Rule"). EPA then disapproved the BART Alternative portion of the SIP on July 5, 2016, implying alleged violations of unidentified CAA "applicable requirements" in the way Utah analyzed the evidence for the BART Alternative. *See, e.g.*, 81 Fed. Reg. 43894, 43909, 43911-12.

II. Request for Reconsideration

II.A. EPA should reconsider the Final Rule because issues of central relevance were unavailable (and thus impracticable) to comment on during the period for public comment.

[4] EPA claims that no one can rely on EPA's statements or representations prior to a final rule: "EPA comment letters are intended to help improve any SIP revision that is under development, but they do not constitute agency action on that SIP revision or constitute any assurance of positive action. . . ." 81 Fed. Reg. at 43911. However, EPA offered its help in this instance specifically intending for it to be relied upon. And indeed it was. EPA does itself, the states, regulated sources and the public a disservice if, as the federal agency charged with helping states (and BART sources) comply with the CAA, its comments and directive assistance for SIP development are mere platitudes. EPA's efforts to improve SIP revisions, however, only ring hollow as EPA now asserts that any such help – here and in the future – is inherently unreliable and in fact should never be relied upon.

EPA proposed amendments to the nationwide Regional Haze Rule on May 4, 2016, that included issues of central relevance to the Final Rule. 81 Fed. Reg. 26942 ("2016 RH Rule Amendments"). The public comment period in the Proposed Rule for the Utah RH SIP/EPA FIP closed on March 14, 2016. 81 Fed. Reg. at 2004. Although PacifiCorp submitted comments to EPA addressing the issues raised by the 2016 RH Rule Amendments, EPA refused to consider PacifiCorp's comments because they were submitted after the close of the comment period for the Utah RH SIP. *See* EPA, Response to Comments for the Federal Register Notice for Air Quality State Implementation Plans (Utah) (June 1, 2016) EPA-R08-OAR-2015-0463 ("RH RTC") at 8, note 1. However, because the issues raised by the 2016 RH Rule Amendments are of central relevance and may have tipped the weight of evidence against EPA's decisions to reject the BART Alternative and to impose the BART NO_x FIP in the Final Rule, EPA should reconsider the Final Rule.

The CAA requires the Administrator of EPA to convene a reconsideration proceeding if "it was impracticable to raise [an] objection" to a final EPA action within the time for public comment or if "the grounds for such objection arose after the period for public comment (but within the time specified for judicial review)" and such objection is "of central relevance to the outcome of the rule." 42 U.S.C. § 7607(d)(7)(B). The CAA further provides that "[a]ll documents which become available after the proposed rule has been published and which the Administrator deems are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability." 42 U.S.C. §7607(d)(4)(B)(i). As explained by the 6th Circuit Court of Appeals:

> The D.C. Circuit has read this portion of the Clean Air Act as permitting the EPA to consider comments submitted after the close of the comment period. *Sierra Club v. Costle*, 657 F.2d 298, 397-98 (D.C.Cir. 1981). This seems a reasonable interpretation of section 7667(d)(4)(B)(i), since this subparagraph refers both to comments submitted during the comment period and comments submitted afterward.

Air Pollution Control Dist. of Jefferson County v. EPA, 739 F.2d 1071, 1081 (6th Cir. Ct. App. 1984).

EPA should consider the 2016 RH Rule Amendments because they include information of central relevance to the outcome of the Final Rule. "[N]ew information . . . may dictate a revision or modification of any promulgated standard or regulation." *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 660 (D.C. Cir. 1975) (citing legislative history); *see also Maier v. EPA*, 114 F.3d 1032, 1037 (10th Cir. 1997) (citing *Oljato*). Because EPA's 2016 RH Rule Amendments were issued after the comment period for the Final Rule, EPA did not consider the following key issues of central relevance to its decisions: (1) reductions in anthropogenic emissions have had limited impact on visibility improvements for Class I areas in the Western United States; and (2) when determining visibility impacts, EPA recommends states compare those days with the most impairment from *anthropogenic* sources rather than just the days with the most

haze. Because EPA did not take into account or receive meaningful comments on these centrally relevant factors it did not properly consider them. Thus, reconsideration is appropriate.

II.A.1 The 2016 RH Rule Amendments add sufficient weight for EPA to approve the BART Alternative.

In the 2016 RH Rule Amendments, EPA advises states to measure visibility impairment "based on anthropogenic visibility impairment rather than based on the days with highest deciview values due to impacts from all types of sources." 81 Fed. Reg. at 26955. As EPA explains, the current Regional Haze Rule "could be read to direct states and the EPA to use the days with the most perceptible *anthropogenic* impairment as the 20 percent most impaired days." *Id.* (emphasis added). These conclusions from the 2016 RH Rule Amendments support Utah's consideration of a variety of visibility-related data, such as the Annual Emissions Comparison as well as the IMPROVE Monitoring Data, rather than just the 98th Percentile modeling metric (which EPA relied on exclusively). *See* Sections III.A.3, 4, and 7 *infra* outlining EPA's disapproval of the Utah RH SIP based on an evaluation of these metrics that contradicts the 2016 RH Rule Amendments.

EPA admits that, while visibility improvement has been significant in the East (where source-specific BART was largely avoided and BART Alternatives were used), some areas in the West have not experienced significant improvement because "reduced emissions from man-made sources have been overwhelmed by impacts from wildfire and/or dust events." *Id.* at 26946. This admission is significant and translates to an admission that the modeled visibility improvements, upon which EPA relies to reject the BART Alternative, often do not translate into real visibility improvements in western Class I areas. This aligns with and supports Utah's findings, based on the IMPROVE monitoring data, that reductions in anthropogenic NO_x emissions are not reliably linked to visibility improvements. *See* Utah DAQ Staff Review, 2008 PM BART Determination and Recommended Alternative to BART for NO_x, May 13, 2015, at 1-14 through 1-19 ("Staff Report").

EPA also endorses strategies developed by RPOs to best identify and address the pollutants that contribute to haze within specific regions. 81 Fed. Reg. at 26947. This supports Utah's reliance on increased SO_2 reductions to compensate for slightly lower NO_x reductions under the BART Alternative, since the RPOs (the Western Regional Air Partnership, or "WRAP," in this instance) have identified SO_2 as the most significant anthropogenic pollutant contributing to the haze on the Colorado Plateau. *See* GCVTC Report at 32-33; WRAP Report at 6-11 through 6-16. *See also* Section III.A.7 *infra* outlining EPA's rejection of Utah's Annual Emissions metric, which relies on SO_2 as the pollutant with the greatest impact on visibility for Class I areas on the Colorado Plateau.

II.A.2 The 2016 RH Rule Amendments undermine EPA's decision that SCR is reasonable as BART.

The same findings discussed above support PacifiCorp's objection that SCR is not reasonable as BART in EPA's FIP. First, the 2016 RH Rule Amendments verify that

emission reductions from stationary sources have not led to improved visibility in some areas in the West. Instead, the questionable impacts from anthropogenic NO_x emissions reductions in the West, call into question EPA's modeled visibility improvements for the affected Class I areas. EPA's BART analyses use modeled visibility improvements to support its FIP, predicting a combined 6.4 dv modeled visibility improvement (1.5 dv + 1.3 dv + 1.9 dv + 1.7 dv) from the installation of LNB/SOFA/SCR at all of the Utah BART Units. 81 Fed. Reg. at 43903-04, Tables 2, 3, 4, and 5. Yet, as now conceded in the 2016 RH Rule Amendments, such modeled visibility improvements do not reliably translate to real visibility improvement in all western Class I areas. EPA recognizes that there "are . . . some western areas were visibility has changed only by a slight amount." 81 Fed. Reg. at 26946. EPA has a statutory duty to determine the "degree of improvement in visibility which *may reasonably be anticipated to result* from the use of such technology." 42 U.S.C. § 7491(g)(2) (emphasis added).

Given this statutory duty and the information referred to in the 2016 RH Rule Amendments, EPA should stay the Final Rule and commence a "reconsideration" proceeding to (1) consider the BART controls already required for these "western areas" where little to slight visibility improvement occurred, (2) determine why those BART controls did not result in greater visibility improvement, (3) determine the difference between the modeled and actual visibility improvements for these western areas, (4) identify why EPA's modeled visibility data were incorrect, and (5) then apply the lessons learned to EPA's BART determination for the Utah BART Units. This analysis on reconsideration is particularly important where, as here, data presented by Utah show a lack of actual monitored visibility improvements from previous NO_x emissions reductions. *See* Staff Report at 1-14 through 1-19.

Further, the 2016 RH Rule Amendments underscore that BART controls must be implemented before the compliance deadline of the first implementation period, which is July 31, 2018. *See* 2016 RH Rule Amendments at 26965. Although EPA proposes extending the due date for SIPs for the second implementation period (2018-2028), EPA emphasizes that it does "*not* intend for the proposed changes to affect the development of state plans for the first implementation period . . . due under the existing Regional Haze Rule." *Id.* at 26944. EPA emphasizes that SIPs must contain emission reduction measures targeted at achieving reasonable progress by the close of the implementation period addressed by the SIP, a "long-standing EPA interpretation." *Id. See* Section III.A.6 *infra*, outlining the failure of EPA's FIP to require BART to be installed by 2018, the close of the first implementation period.

Because the 2016 RH Rule Amendments contradict key analyses that EPA relied on to disapprove the BART Alternative and to support the FIP, EPA should reconsider the Final Rule.

III. Administrative Stay Argument

In addition to the issues for reconsideration outlined above, EPA should stay implementation of the BART NO_x FIP requirements because there are numerous legal

and technical flaws in the Final Rule. Because the FIP is dependent upon EPA's decision to reject the BART Alternative, EPA should stay the entire Rule.

The legal standard for an administrative stay is even broader than the standard for a judicial stay. The Administrative Procedures Act grants EPA authority to stay the BART NO_x FIP's requirements when "justice so requires . . . pending judicial review." 5 U.S.C. § 705. Despite this broad authority to grant stays, agencies often apply the more specific criteria governing preliminary injunction requests when determining whether a stay should be granted. *See Affinity Healthcare Servs. v. Sebelius*, 720 F. Supp. 2d 12, 15 note 4 (D.D.C. 2010) ("Motions to stay agency action pursuant to [5 U.S.C. § 705] are reviewed under the same standards used to evaluate requests for interim injunctive relief."). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008); *see also RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) (same).

The Tenth Circuit has adopted a less stringent requirement for proving the likelihood of success. *See Davis v. Mineta*, 302 F.3d 1104, 1111 (10th Cir. 2002). In the Tenth Circuit:

> If the plaintiff can establish that the latter three requirements tip strongly in his favor, the test is modified, and the plaintiff may meet the requirement for showing success on the merits by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation."

Id. (citation omitted). This modified requirement for likelihood of success applies here, as discussed below.

III.A. PacifiCorp Is Likely to Prevail on The Merits.

The EPA's NO_x BART determination in the FIP should be stayed by EPA because the determination, and EPA's rejection of Utah's RH SIP, are flawed in several critical respects, as shown below. Thus, PacifiCorp's challenges to EPA's disapproval of the Utah RH SIP and adoption of the FIP in the U.S. Court of Appeals for the Tenth Circuit are likely to succeed on the merits (and, at a minimum, present serious and substantial questions). EPA's errors range from fundamental legal misinterpretations and improper applications of its own rules governing BART determinations to flawed technical analyses and procedural failures. In addition, EPA's errors result in unlawful federal interference with the State's regulatory processes and improperly require expenditures in excess of $700 million dollars that will impact energy costs throughout the State of Utah. EPA should take into account the seriousness of these issues in evaluating PacifiCorp's likelihood of success on the merits. Even if EPA believes that the courts may ultimately sustain the Final Rule upon judicial review, PacifiCorp's claims provide a compelling basis for a stay pending judicial review because the extreme

costs, indeterminate benefits, and the potential for interference with Utah's state sovereignty present such substantial issues.

III.A.1. PacifiCorp's requests for reconsideration support a stay.

As outlined above, EPA's failure to consider the 2016 RH Rule Amendments, and the related implications, when it promulgated the Final Rule supports reconsideration of the Final Rule by EPA. The D.C. Circuit Court has found that a legitimate case for reconsideration supports a stay. *See, e.g.*, *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 189 (D.C. Cir. 2011) ("industry should not have to build expensive new containment structures until the standard is finally determined"). In addition, several courts have recently granted stays based on substantial issues of cost and state sovereignty raised under regional haze rules, even where EPA has refused to grant an administrative stay. *See Texas v. EPA*, 2016 WL 3878180 at *20 (5th Cir. July 15, 2016); *Oklahoma v. EPA*, 723 F.3d 1201, 1206-07 (10th Cir. 2013); *Wyoming v. EPA*, Nos. 14-9529, 14-9530, 14-9533, 14-9534 (10th Cir. Sept. 9, 2014); *Cliffs Nat. Res. Inc. v. EPA*, Nos. 13-1758, 13-1761 (8th Cir. June 14, 2013). As outlined above, the Tenth Circuit Court of Appeals has ruled that plaintiffs may meet the success on the merits requirement by showing their claims are "serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." *Davis v. Mineta*, 302 F3d 1104, 1111 (10th Cir. 2002). Because PacifiCorp's claims for reconsideration are sufficient to meet this standard, they also support the likely success of such claims on the merits and the need for EPA to grant the requested stay.

III.A.2. EPA failed to consider required cost and energy/environmental impacts when rejecting the BART Alternative.

EPA violated the clear language of the Regional Haze Statute (42 U.S.C. §§ 7491 and 7492) and Rule (40 C.F.R. §§ 51.300-309) by ignoring comparative costs in its rejection of the BART Alternative. When evaluating the BART Alternative, the ultimate question is whether or not it will result in greater "reasonable progress" than BART. 40 C.F.R. § 308(e)(2). EPA improperly redefines "reasonable progress" as solely "greater visibility improvement," while the Regional Haze Statute clearly requires consideration of costs – including the comparative cost differences between the BART Alternative and BART – to determine reasonable progress. Indeed, the plain language of the CAA makes crystal clear that "in determining reasonable progress there shall be taken into consideration the costs of compliance . . . ." 42 U.S.C. § 7491(g)(1). And yet EPA claims, "because the described cost difference does not have a direct bearing on whether the BART Alternative achieves greater reasonable progress, it is not material to our action whether we agree or disagree with Utah's conclusion that the BART Alternative would have a lower cost impact." 81 Fed. Reg. at 43901. EPA cannot make a determination about whether the BART Alternative makes greater reasonable progress than BART, without comparing the two options, and a reasonable progress determination, by statute, considers costs.

By refusing to consider comparative costs, EPA effectively has written "reasonable" out of the "reasonable progress" standard and instead attempts to impose a

more restrictive "visibility-only" standard that was not contemplated by Congress. Even in a ruling where cost was less prominently required by the statute, the U.S. Supreme Court required EPA to consider costs, explaining, "Statutory context reinforces the relevance of cost." *Michigan v. EPA*, 135 S. Ct. 2699, 2708 (2015). Here, the need to consider the comparative cost difference is even more important because not only the context but the plain language of the RH Statute requires it.

Also, EPA's own regulations require EPA to "[c]onsider the costs of compliance" as the first requirement for determining reasonable progress. 40 C.F.R. § 51.308(d)(1)(i)(A). The Tenth Circuit Court of Appeals confirmed the requirement to consider not only costs, but also and energy/environmental impacts, to determine reasonable progress under the Regional Haze Statute:

> "Reasonable progress" is measured by comparing "the costs of compliance, the time necessary for compliance, . . . the energy and non-air quality environmental impacts of compliance, and the remaining useful life of any existing [regulated] source" (known as the "four factors").

WildEarth Guardians v. EPA, 770 F.3d 919, 924 note 3 (10th Cir. 2014) (quoting 42 U.S.C. § 7491(a)(4), emphasis added).

EPA's refusal to consider energy/environmental factors as part of the assessment of the BART Alternative is similarly fatal to EPA's ultimate determinations in the Final Rule. As noted above, the Tenth Circuit has explained that "reasonable progress" is measured by comparing, among other things, energy and non-air quality environmental impacts. *WildEarth Guardians*, 270 F. 3d at 924. Like costs, energy/environmental impacts are required to determine reasonable progress by the Regional Haze Statute: "in determining reasonable progress there shall be taken into consideration . . . the energy and nonair quality environmental impacts of compliance." 42 U.S.C. § 7491(g)(1). Like costs, EPA claims that although "the Utah BART Alternative would avoid an annual energy penalty of approximately $2 million . . . . Because such benefits do not have direct bearing on whether the BART Alternative achieves greater reasonable progress, it is not material to our action whether we agree or disagree with Utah's assessment that they reduce energy and non-air quality impacts." 81 Fed. Reg. at 2024.

In short, PacifiCorp will prevail because EPA defied the plain language of the statute when it refused to consider comparative costs and energy impacts/ non-air quality environmental impacts to disapprove Utah's BART Alternative.

III.A.3. EPA introduces a new, narrow "clearly demonstrated . . . greater visibility benefits" standard in the Final Rule that is contrary to the statutory "greater reasonable progress" standard.

The EPA excluded costs and energy/non-air quality impacts from consideration when analyzing the BART Alternative because EPA illegally changed the statutory "greater reasonable progress" standard to the illegal and narrower "greater visibility benefits" standard. For the first time in the Final Rule, EPA introduces this new standard

for the weight-of-evidence analysis for the BART Alternative. EPA's new standard is most clearly articulated in the Response to Comments: "The weight-of-evidence analysis answers just this question—whether the Alternative will clearly result in greater visibility benefits." RH RTC at 39. However, under the Clean Air Act a "reasonable progress" analysis, and by extension a "greater reasonable progress" analysis, requires analysis of not just visibility impacts but also the specific costs of compliance, energy impacts, other environmental impacts, and the useful life of the source.[5] EPA's newly minted "greater visibility benefits" test excludes several of these factors and thus does not comply with the plain language of the statute.

Seemingly in an effort to quietly implement a new standard in the Final Rule, EPA fails to clearly explain the new standard or its narrowness except in its application. At page 43902 in the first column, for example, EPA applies the standard to reject the BART Alternative: "[W]e find that, on balance, the evidence does not show that the Alternative *clearly achieves greater visibility benefits* than BART." (Emphasis added); *see also, e.g.*, 81 Fed. Reg. at 43897, 43901, 43909, 43915. EPA then continues to develop and apply the new standard through several separate explanations in the Final Rule.

> [Evaluating the evidence] involves assigning weights to each piece of information that indicate *the degree to which it supports a finding that the alternative program will achieve greater visibility benefits* [emphasis added]. Such a weighing system might find that: (i) The information *clearly* shows the alternative will achieve greater reasonable progress than BART [emphasis in original]; (ii) the information supports the alternative in some way, *but not clearly* [emphasis added]; or (iii) the information does not support the alternative. . . .
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> . . . .
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> [W]e assessed the [State-provided] metrics collectively to determine whether the relevant evidence, considered as a whole, *clearly demonstrated that the alternative program achieves greater visibility benefits*. [emphasis added] . . . Our initial review considered whether each of the nine metrics met the *threshold regulatory requirement that information considered in a weight-of-evidence analysis be relevant to an assessment of visibility impacts*. [emphasis added] . . . the [costs and energy and non-air quality] metrics do not evaluate *visibility* benefits [emphasis in original] at the nine Class I areas impacted by the State's sources. Therefore . . . we did not give this information any weight in our evaluation of whether the State has demonstrated that its BART Alternative achieves greater reasonable progress than BART.

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[5] "For purposes of this [Regional Haze] section—in determining reasonable progress there shall be taken into consideration the costs of compliance, the time necessary for compliance, and the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any existing source subject to such requirements." 42 U.S.C. § 7491(g)(1).

81 Fed. Reg. at 43897.

In other words, EPA's new "greater visibility benefits" standard, as applied, takes the statutory definition of greater "reasonable progress," subtracts from that definition the required components of costs, energy and non-air quality considerations, and then applies the new standard absent such components. This EPA cannot do. Courts have found procedural error where, as here, "vital assumptions" regarding the basis for EPA's new standard do not conform to the governing statute and EPA's own regulations, and the Agency's subsequent justification was not subject to notice-and-comment rulemaking. *See* *New Jersey v. EPA*, 517 F.3d 574, 583-84 (D.C. Cir. 2008) (vacating EPA rulemaking that "nullifie[d]" provisions of the CAA). Vacatur of agency action is "the normal remedy" for procedural error. *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110-11 (D.C. Cir. 2014). PacifiCorp is likely to prevail on the merits regarding this issue.

III.A.4. EPA failed to give proper deference to Utah's selection and weighing of metrics in rejecting the BART Alternative.

Congress stated in Section 169A(b)(2)(A) of the CAA that BART is "determined by the State." 42 U.S.C. § 7491(b)(2)(A) Utah determined that LNB/SOFA were NO_x BART for the Utah BART Units in its 2008 SIP, rejecting SCR. This requirement subsequently became law in Utah (and EPA failed to fulfill its duty to respond to this action for years). Based on this PacifiCorp installed the new equipment required by Utah's NO_x BART determination. When EPA rejected this determination more than four years after it was submitted, the State proceeded to propose a BART Alternative that would achieve greater reasonable progress, based on an analysis of nine different metrics. However, EPA again rejected Utah's analysis based on a single metric (out of the nine) that EPA claims is enough—on its own—to overturn the State's determination.

The single metric is the 98th percentile metric. The 98th percentile metric represents the visibility impact occurring on a single day during the year (normally the eighth highest day), and is based on a computerized model which relies on a myriad of inputs and assumptions. As EPA itself has recognized, this metric represents only "the extreme tails of a distribution," appropriate for determining whether a source is BART-eligible, but not to determine the precise amount of visibility impact. EPA, 70 Fed. Reg. 39104, 39121 (July 6, 2005) ("BART Guidelines").

In order to determine reasonable progress, as required for a BART Alternative, the RH Rule requires "improvement in visibility for the most impaired days . . . [and] no degradation in visibility for the least impaired days." 40 C.F.R. § 51.308(d)(1). The most and least impaired days are defined as the 20 percent highest and lowest days of monitored visibility impairment. 40 C.F.R. § 51.301. Thus, the 98th percentile metric—based on modeling, not monitoring—is not sufficient, by itself, to determine improvement in visibility or reasonable progress. Again, EPA normally recognizes this fact:

> [T]he 98th percentile value would only be used to determine whether a particular BART-eligible source would be subject to further review by the State. . . . In determining what, if any, emission controls should be required, the State will have the opportunity to consider the frequency, duration, and intensity of a source's predicted effect on visibility.

BART Guidelines, 70 Fed. Reg. at 39121. Contrary to this EPA statement, in the Final Rule EPA wrongly "gives most weight to the visibility impacts based on the 98th percentile air quality modeling results." In fact, EPA gives so much weight to the 98th percentile metric that it overcomes all the other metrics relied on by Utah and wrongly causes EPA to conclude that the BART Alternative does not result in greater reasonable progress (or to be more precise, EPA's substitute standard—greater visibility improvement). 81 Fed. Reg. at 43899.

EPA also claims that "the State's summary of the weight-of-evidence did not include the results from the 98th percentile modeling impact," and that the State "did not assess the relative strengths and weaknesses of the metrics." 81 Fed. Reg. at 43897-98. However, contrary to EPA's claim in the Final Rule, Utah took the 98th percentile metric into account and properly weighed its value in making its determination that the BART Alternative provides greater reasonable progress than EPA's BART determination of SCR. *See* Staff Report, at 1-14 through 1-19.

While the Staff Report is understandably technical, its findings are clear: NO_x reductions over the past 15 years have not resulted in the visibility benefits predicted by the 98th percentile metric, while SO_2 reductions have. *Id.* at 1-15. Based on these findings:

> DAQ has greater confidence that modeled improvements due to reductions in SO_2 will be reflected in improved visibility . . . to the Class I areas, while reductions in NO_x have a more uncertain benefit."

Id. at 1-19. Based on this substantial analysis, the State gave more weight to the visibility benefits associated with its BART Alternative, which relies on the reduction of both SO_2 and NO_X emissions, and rightly gave only marginal weight to the 0.14 dv advantage modeled for the 98th percentile metric associated with EPA's BART requirement, which only relied on the reduction of NO_X emissions. The data contradicting the 98th percentile metric include real-time monitoring data showing that actual NO_x emission reductions achieved at multiple anthropogenic sources surrounding the Class I areas have not led to visibility improvements predicted by the model. *Id.* at 1-15 and 1-18. On the other hand, the same monitoring data showed that SO_2 reductions were more reliably linked to the visibility improvements predicted by the modeling. *Id.* Utah properly reviewed observed monitoring data to verify, analyze and provide context for the computer model results used in the 98th percentile metric. With all of that information in mind, Utah was able to determine what weight the 98th percentile modeling results should be given in the BART Alternative analysis. Such actions fall totally within the State of Utah's discretion; such discretion cannot be coopted by EPA because it does not like the state's result. The BART Guidelines establish that states have the "flexibility to assess visibility

improvements due to BART controls by one or more methods, or by a combination of methods." 70 Fed. Reg. at 39129, and states "are **free to determine the weight and significance to be assigned to each factor**" for visibility improvements. 40 C.F.R. Part 51, App. Y, IV(D)(5) (emphasis added).

EPA has been warned by the courts before for failing to account for the limitations of the computerized modeling relied on for the 98th percentile metric. The Ninth Circuit Court of Appeals recently remanded a BART determination to EPA that failed to account for "the model's ability to anticipate improvements at a level allegedly within its margin of error, whether perceptible or not to the human eye." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1147 (9th Cir. 2015). EPA has estimated that, based only on this metric, its chosen BART control (SCR at all four units) would result in an average incremental visibility improvement (over the BART Alternative) at the nine impacted Class I areas of just 0.14 deciviews (approximately one-seventh of what is discernible to the human eye). 81 Fed. Reg. at 43898-99. And yet EPA relies solely on this metric, for which many of the computerized modeled visibility results are within the margin of error, to reject Utah's BART Alternative, which properly gave this metric less weight. Further, the cases EPA cites as support for primary reliance on the 98th percentile metric do not support sole reliance on this metric when it contradicts other evidence submitted by a State. *See* 81 Fed. Reg. at 2022, note 90 (claiming to cite regional haze determinations where the 98th percentile metric is "one of the primary metrics that EPA has relied on").[6]

The CAA Statute requires that "the Administrator shall approve such [SIP] as a whole if it meets all of the applicable requirements of [the Clean Air Act]."). By reanalyzing, distorting, and even completely disallowing several of the metrics provided by the State, and placing undue emphasis on the 98th percentile metric, EPA unlawfully imposes its own interpretation of which "evidence" should be considered and emphasized. Such value judgments are not an applicable requirement under the CAA but are instead left to the discretion of the states. EPA can cite no statute or regulation that requires the 98th percentile metric to outweigh all other evidence presented by the state.

Because "Congress intended the states to decide which sources impair visibility and what BART controls should apply to those sources," *American Corn Growers Ass'n v. EPA*, 291 F.3d 1, 8 (D.C. Cir. 2002), EPA must defer to the State's analysis of the evidence unless it violates an applicable requirement of the Clean Air Act. Here, it does not. EPA admits Utah's BART Alternative is a "close call." 81 Fed. Reg. at 43912. EPA also admits its role is deferential to the States as long as a SIP meets the applicable requirements of Act. *See, e.g.*, 81 Fed. Reg. at 2006 ("it is preferable that the regional haze program be implemented through state plans"); 81 Fed. Reg. at 43909, 43912. And EPA admits it must approve a regional haze SIP when a state's discretion is "reasonably exercised and . . . supported by adequate documentation of its analyses." 81 Fed. Reg. at 43909, citing Proposed Rule, 81 Fed. Reg. at 2006. As discussed above, the State's

[6] It should be noted that the Maryland determination cited by EPA does not use or mention the 98th percentile metric. The Tesoro and Arizona determinations merely used the 98th percentile metric as additional support for other state metrics that demonstrated greater reasonable progress by substituting SO_2 for NO_x reductions.

legitimate consideration of the undisputed and massive cost difference between the Alternative and BART, as well as the energy/environmental costs of BART, are appropriate under the Act. The State's discounting of the marginal visibility improvements predicted by the 98th percentile metric, which are contrary to actual monitored data, is appropriate under the Act. Where, as here, the State has provided numerous metrics supported by legitimate evidence and analysis, a "close call" must weigh in Utah's favor, and EPA must give the proper deference to the State's determination. PacifiCorp is likely to prevail on this issue.

III.A.5. EPA's failure to properly account for "existing pollution control equipment" when calculating the visibility impact and costs for the FIP violates the Clean Air Act.

EPA's NO_x BART analysis fails to account for the installed LNB/SOFA when conducting the baseline emissions analyses, cost analyses, and visibility improvement analyses. The LNB/SOFA were installed at each of the Utah BART Units from 2006-2014, a fact that EPA openly acknowledges. *See, e.g.*, 81 Fed. Reg. at 2023. However, EPA conducted a new NO_x BART analysis for its FIP that ignored the existing LNB/SOFA for all practical purposes (pretending the LNB/SOFA didn't exist when conducting the cost and visibility analyses). EPA calculated "cost-effectiveness" and "visibility improvement" for NO_x BART at the Utah BART Units as if the LNB/SOFA had not been installed. EPA's failure to account for "existing pollution control equipment" is contrary to the CAA and skewed EPA's FIP to make SCR look more reasonable by taking credit for reductions from the existing equipment. *See North Dakota v. EPA*, 730 F.3d 750, 763-64 (8th Cir. 2013) (vacating a FIP where EPA ignores reductions from existing pollution control equipment).

Given that a review of "any pollution equipment in use or in existence at the source" is one of the five BART factors, EPA is required by statute to properly account for this equipment in its BART analysis. On this basis alone, EPA should grant this Request for Reconsideration and Stay.

III.A.6. EPA's FIP is illegal because it does not – and never can – ensure BART implementation by 2018 as required by law.

EPA's FIP does not ensure the installation of BART controls during the time period covered by the SIP and is therefore unlawful. In developing a FIP for NO_x BART, EPA is subject to the same regulatory limitations as a state. *See* 77 Fed. Reg. 40150, 40164 (July 6, 2012) ("At the point EPA becomes obligated to promulgate a FIP, EPA steps into the State's shoes, and must meet the same requirements. . . ."). Further, "EPA may not use its own delay as an excuse for imposing burdens . . . that the Regional Haze Rule does not permit." *Texas v. EPA*, No. 16-60118, 2016 WL 3878180, at *17 (5th Cir. July 15, 2016). Thus, if the EPA FIP does not comply with same requirements that would bind Utah, even if this is caused by EPA's failure to timely act on Utah's 2008 SIP, the FIP is invalid.

Under the Regional Haze Rule, SIPs (and therefore FIPs) must establish "the emission reduction measures needed to achieve [the reasonable progress goal] *for the period covered by the implementation plan*." 40 C.F.R. § 51.308(d)(1)(i)(B) (emphasis added). SIPs must also impose "enforceable emissions limitations, compliance schedules, and other measures as necessary to achieve the reasonable progress goals" within the planning period of the SIP. 40 C.F.R. § 51.308(d)(3).

BART is one of the enforceable emissions limitations and must be included in a state's initial SIP. 40 C.F.R. § 51.308(e). The first planning period for SIPs lasts from 2007–2018, and states are required to submit revised SIPs for each ten-year period thereafter. 40 C.F.R. § 51.308(b), (f); *see also* 42 U.S.C. § 7491(b)(2)(B). The Regional Haze Rule specifically articulates the requirement that "all necessary emission reductions take place during the period of the first long-term strategy for regional haze" for BART Alternatives, which is the same time period as the requirement for installation of BART. 40 C.F.R. § 51.308(e)(2)(iii). This requirement is proved by "including schedules for implementation." *Id.*

EPA has consistently required that BART be installed and implemented before the end of the first planning period. As EPA explained for its Wyoming FIP:

> [T]he statute explicitly calls for a program of reductions over time, and incremental reasonable progress towards the long-term goal. The requirement for states to implement BART applies during the first planning period ending in 2018 and is the first increment of progress.

79 Fed. Reg. 5032, 5170; *see also id.* at 5055 (rejecting claims that requiring BART reductions to occur within the first planning period was "front-loading" the reasonable progress requirements). In SIP actions for both Maine and Arizona, EPA again indicated that BART requirements must be implemented during the first implementation period. *See* 78 Fed. Reg. 8083, 8085 (Arizona SIP disapproval) ("During the first implementation period for the Regional Haze Program (through 2018), states must also impose best available retrofit technology ('BART') on 'BART-eligible sources'. . . ."); 77 Fed. Reg. 24385, 24387 (Maine SIP approval) ("States must determine BART eligibility and controls only during this first planning period . . . ."). EPA has definitively stated that the first regional haze planning period for Utah ends in 2018. 77 Fed. Reg. 28825, 28838 (May 16, 2012) (when reviewing a previously submitted BART Alternative, EPA said: "The first planning period ends in 2018"); 77 Fed. Reg. 74355, 74368 (Dec. 14, 2012) ("Nor, at this time, are such emissions increases expected during the first planning period (2003-2018).").

However, despite its own requirements, consistent practice, and specific statements about Utah's first planning period ending in 2018, EPA's BART FIP for Utah does not require installation of SCR until 2021, three years after the end of the first planning period. 81 Fed. Reg. at 43924 (40 C.F.R. § 52.2336(d)) (establishing compliance dates of 2021). While EPA may argue that its belated FIP BART requirements resulted from the late disapproval of Utah's SIP, it is actually EPA's failure

to act on Utah's 2008 SIP (which contained BART for NOx) that accounts for this delay.[7] Because EPA's delay contributed to the late FIP, and because the FIP's BART timing requirement is inconsistent with the CAA and EPA's consistent practices, the FIP is invalid. PacifiCorp is likely to prevail on the merits on this issue.

EPA is aware that, although BART controls can be required on eligible units only during the first regional haze planning period, emission sources like the Utah BART Units will be subject to ongoing regulation under regional haze requirements. In other words, the State of Utah surely will visit again in future planning periods whether or not NOx controls such as SCR systems are appropriate at the Utah BART Units. 81 Fed. Reg. 26942, 26947 (May 4, 2016).

III.A.7. EPA improperly rejected Utah's "annual emissions comparison."

Utah found that the "combined emissions of three key visibility-impairing pollutants will be lower under the BART Alternative scenario and that this supported the weight of evidence determination that the BART Alternative will provide greater reasonable progress than BART." 81 Fed. Reg. at 43898. EPA found that, although this metric "is a relevant concept," in this instance the metric is "inconclusive," and Utah could not offset minor NO_x emissions increases with substantial SO_2 and PM emissions reductions because of "differences in visibility impacts and complex interactions between pollutants." *Id.*

EPA's actions ignore the substantial data already before the agency regarding the impact of SO_2 and PM emissions on visibility. A commission established by the CAA to study the Colorado Plateau, where all the Class I areas affected by the Utah BART Units are located, determined that sulfates (produced by SO_2 emissions) are the most significant anthropogenic pollutant contributing to the haze on the Colorado Plateau. *See* Grand Canyon Visibility Transport Commission, Recommendations for Improving Western Vistas (June 10, 1996) at 33 ("GCVTC Report") (recommending near- and long-term focus on SO_2 to ensure reasonable progress); *see also* 40 C.F.R. § 51.309.[8] The WRAP the successor to the GCVTC, provides regular reports to EPA on reasonable progress for Class I areas impacted by Utah. Some of these reports are included in the record for the Utah RH SIP. *See, e.g.*, WRAP Regional Haze Rule Reasonable Progress Report Support Document, State and Class I Area Summaries, at 6-11 through 6-16 (Doc. No. EPA-R08-OAR-2015-0463-0200) ("WRAP Report"). The WRAP Report includes analyses of the relative visibility impacts by pollutant (expressed as "aerosol extinction") at the affected

[7] Given the planning, engineering, procurement, and construction necessary to construct simultaneously four SCRs, not to mention the need to locate and obtain reasonably priced electricity to replace that produced by the Hunter and Huntington power plants during construction shut-downs, the four SCRs required by EPA's FIP cannot reasonably be constructed prior to the end of 2018.

[8] As a result of this and other information, there has been a concerted focus on anthropogenic SO_2 emissions as the leading impairment to visibility for Class I areas on the Colorado Plateau. *See, e.g.*, 77 Fed. Reg. 73926 (approval of Wyoming SIP with focus on SO_2 reductions); 77 Fed. Reg. 74355 (approval of Utah SIP with focus on SO_2 reductions); 77 Fed. Reg. 30953 (approval of New Mexico SIP with focus on SO_2 reductions).

Class I areas. The WRAP Report documents, for example, that ammonium sulfate (produced by SO_2 emissions combining with ammonia) accounted for 21% of the visibility impacts on the most impaired days at Zions Canyon, while ammonium nitrate (produced by NO_x emissions combining with ammonia) accounted for only 7%, from 2005-2009. Canyonlands shows a similar ratio, with 23% impacts from ammonium sulfate compared to 14% from ammonium nitrate. *Id.* at 6-11. This information clearly establishes that SO_2 emissions reductions will have as much, or even greater, impacts on visibility than NO_x emissions reductions.

Similarly, Progress Reports submitted to EPA every five years from the State further validate the WRAP findings. *See, e.g.*, Utah Div. of Air Quality, Progress Report for Utah's State Implementation Plan for Regional Haze, May 18, 2015 at F-26 through F-28 ("For all sites, ammonium sulfate was the largest contributor to the non-Rayleigh aerosol species of extinction."). For Zions Canyon, ammonium sulfate accounted for 21% of visibility impairment for 2009-2013, while ammonium nitrate accounted for only 7%. *Id.* at F-27. EPA almost concedes the existence of this data in the Proposed Rule:

> [W]e propose to concur with Utah's finding that SO_2 emissions reductions should provide visibility benefits in all seasons and that sulfate is the largest contributor to visibility impairment at the affected Class I areas. Furthermore, we propose to find that these observations suggest that the BART Alternative is likely to achieve greater reasonable progress.

81 Fed. Reg. at 2022. In the Final Rule, EPA agrees with the State that "sulfate is the largest contributor to visibility impairment at the affected Class I areas." 81 Fed. Reg. at 43900.

Because the State reasonably exercised its discretion and supported its decision with adequate documentation, the burden is on EPA to show that State's decision does not meet an applicable requirement. *See United States v. Minnkota Power Coop.*, 831 F. Supp. 2d 1109, 1121 (D. N.D. 2011) (placing burden on EPA to show state permitting decision is "unreasonable, arbitrary, or capricious"). With all of the available information showing the greater visibility impacts of SO_2 emissions as compared to NO_x emissions, EPA's claim that it lacked "information on the likely visibility impacts of the State's alternative program as compared to BART," 81 Fed. Reg. at 43897, is simply false and another contrived effort to support a particular result (SCR) when the BART Alternative shows greater reasonable progress. Even if the State had not provided such extensive analysis (which it did), EPA "retains a duty to examine key assumptions as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule." *Appalachian Power Co. v. EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998). This burden is heightened when EPA's decision "runs counter to the evidence before the agency." *United States Sugar Corp. v. EPA*, No. 11-1108, 2016 WL 4056404, at *51 (D.C. Cir. July 29, 2016) (quoting *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). EPA's reliance on a lack of modeling data does not meet its burden. *See* 81 Fed. Reg. at 43898. EPA's determination that the "annual emissions comparison" metric is "inconclusive" based on an alleged lack of data about the impact of SO_2 emissions on visibility (as compared to NO_x emissions), is incorrect, unsupportable, and

contrary to both the State's determination and the enormous amounts of data in the possession of EPA. This is yet another reason PacifiCorp will prevail on the merits.

III.A.8. EPA arbitrarily changed its position in the Final Rule by improperly analyzing the impact of pre-FIP deadline emission reductions and resulting visibility improvements.

EPA illegally ignored data in the record and public comments about emissions reductions under the BART Alternative that occur before the BART installation deadline in EPA's FIP (sometimes referred to as "early" reductions in the record), and improperly changed its position between the Proposed and Final Rule about which of these reductions under the BART Alternative qualified for consideration in the reasonable progress analysis. In the Proposed Rule, EPA stated:

> [R]eductions under the Utah BART Alternative will occur earlier than the BART Benchmark. The reductions under the Utah BART Alternative are required under the State SIP by August 2015 . . . and would provide an **early and on-going visibility benefit** as compared to BART. . . . BART likely would be fully implemented sometime between 2019 and 2021. Therefore, we recognize that the reductions from the BART Alternative would occur before the BART Benchmark.

81 Fed. Reg. at 2030 (emphasis added); *see also id.* at 2018 and 2023. On both sides of its Proposed Rule to potentially approve and disapprove the BART Alternative, EPA recognized "early and ongoing" emission reductions resulting under, and supporting the adoption of, the BART Alternative.[9] These pre-FIP deadline emissions reductions included those from LNB/SOFA installations on all four Utah BART Units (as required by the Utah RH SIP), LNB/SOFA on an additional non-BART unit (Hunter Unit 3), and the shutdown of the two units at the Carbon plant. 81 Fed. Reg. at 2018.

However, in the Final Rule, EPA backtracked as follows:

> [W]e have decided to consider only those emission reductions that occurred between 2006 and 2011 as lending weight to the argument that the Alternative will provide for greater reasonable progress.

RH RTC at 138. This means that between the Proposed Rule and the Final Rule, EPA decided to ignore the pre-FIP deadline emission reductions from the LNB/SOFA

[9] As EPA explained when approving a previous Utah BART Alternative, early emission reductions weigh in favor of the BART Alternative when a "state implementation plan submittal may have already influenced sources to upgrade their plants before any case-by-case BART determination . . . may have required it." *WildEarth Guardians v. EPA*, 770 F.3d 919, 937 (10th Cir. 2014) (quoting EPA). EPA also has taken early emission reductions into account for other BART Alternatives. *See, e.g.*, 79 Fed. Reg. 46514 (using early emission reductions as justification for a BART Alternative FIP for the Navajo Nation); 77 Fed. Reg. 34801, 34804 (acknowledging early emission reductions made by Minnesota (Metropolitan Emission Reduction Program) to approve its proposed BART Alternative of the Cross State Air Pollution Rule).

installation at one of the Utah BART Units as well as those from the shutdown of the Carbon plant, even though it considered such reductions under all aspects of its Proposed Rule. Moreover, EPA further ignored all pre-FIP deadline emissions reductions already generated, and to be generated, under the BART Alternative between 2011 and 2021 (the BART installation date for the SCR systems under EPA's FIP). As a result, EPA purposely excludes hundreds of thousands of tons of emission reductions – and the resulting visibility benefits – achieved before the 2021 FIP compliance date.

EPA was fully aware of these reductions. In its public comment letter, PacifiCorp reported that 340,000 tons of emission reductions had occurred under the BART Alternative through 2014, and estimated that an additional 235,000 tons of added emissions reductions would occur through 2021, the FIP compliance deadline. RH RTC at 136-137 (*see* figure at 137). Contrary to EPA's decision to sweep some of these pre-FIP deadline emission reductions under the proverbial carpet for purposes of evaluating the BART Alternative, all of these emission reductions actually have occurred, or will occur based on currently installed controls and current unit closures, before emission reductions from BART would take place. This clearly means that all – not just some – of the pre-FIP deadline emission reductions should have been considered by EPA in evaluating the BART Alternative. *See* PacifiCorp Comments on Proposed Rule, March 14, 2016, Cover Letter/Executive Summary at 2; Full Comments at 16, 23. Not only did EPA fail to consider these reductions, EPA could not even bring itself to make its refusal clear in the Federal Register, only admitting the specifics in the RH RTC. EPA's refusal to consider all pre-FIP deadline emissions reductions is arbitrary and capricious because it failed to consider an "important aspect of the problem," and because its decision "runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

In the RH RTC, EPA incorrectly claims that Utah only considered pre-FIP deadline emissions reductions through 2011 so that EPA is only required to do the same. RH RTC at 138. EPA, however, considers an isolated statement by Utah out of context. Both Utah and PacifiCorp provided EPA with information indicating that the pre-FIP deadline emissions commenced in 2006 and would provide "a corresponding early and on-going visibility improvement" until the BART compliance deadline, which EPA set in the FIP as 2021. Utah Staff Report at 1-13. *See also* PacifiCorp Comments on Proposed Rule, March 14, 2016, Cover Letter/Executive Summary at 2; Full Comments at 16, 23. Moreover, Utah clearly relied on the pre-FIP deadline emissions reductions from Carbon (2015 and beyond) and LNB/SOFA installed at Hunter 1 in 2014 when assessing other metrics (such as aggregate emissions reductions, etc.). *See* Staff Report at 1-12, Table 2 (projecting pre-FIP deadline emissions after 2011); and 1-30 (a full section outlining pre-FIP deadline emission reductions, including reductions after 2011). EPA's attempt to artificially limit the pre-FIP deadline reductions that Utah not only considered but relied upon infringes on Utah's statutory role to make value judgments when determining BART, and by extension a BART Alternative. Because EPA is overturning a state determination, its obligation to consider all of the information supporting that determination is high. *See* 42 U.S.C. § 7410(k)(3); *Texas v. EPA*, No. 16-60118 at *1 ("The structure of the Clean Air Act indicates a congressional preference that states, not EPA, drive the regulatory process."); *Minnkota Power Coop.*, 831 F. Supp. 2d at 1121

(D. N.D. 2011) (reversing EPA's disapproval of a state CAA determination and holding that "[the State's] conclusions regarding such highly technical matters are entitled to deference unless EPA proves them to be unreasonable, arbitrary, or capricious").

In the end, EPA explained in the RH RTC that its decision not to consider hundreds of thousands of tons of pre-FIP deadline emission reductions caused it to give only "some weight to this metric but [to] not consider the timing of these reductions to be compelling." RH RTC at 138. This pivotal announcement shifts consideration of the full effect of emission reductions occurring from 2006-2021 to a more limited effect from only those reductions that took place from 2006-2011. This is dramatic discounting of a key metric supporting the BART Alternative. *See id.* Again, because the decision to disapprove the BART Alternative was such a "close call," any additional piece of favorable evidence should tip the balance towards approval of the Alternative. Because EPA purposefully refused to consider all evidence before the agency regarding pre-FIP deadline emissions reductions, EPA acted arbitrarily and capriciously; as a result, PacifiCorp will likely prevail on the merits.

III.A.9. EPA failed to adjust its FIP BART analysis after acknowledging a cost error of more than $80 million in the Final Rule.

EPA's admitted error of more than $80 million ($20 million per unit) in its required SCR cost analysis renders its BART decision arbitrary.[10] Although ultimately acknowledging that the error existed in the Proposed Rule and that EPA relied upon the erroneous numbers to find SCR is cost-effective control equipment, EPA declines to conduct additional analysis to account or adjust for the error:

> [W]e revised our analysis of the cost of installing and operating NO_x BART controls at the four subject-to-BART EGUs. . . . [W]e concluded it was unnecessary to review our analysis of visibility improvement or the other statutory BART factors. Our proposed action contains a full description of the five step BART analysis, the five BART factors [which include statutorily required cost analysis], and our proposed BART determination.

81 Fed. Reg. at 43902. The error impacts not only the assumed total capital costs for SCR, but also significantly increases the incremental cost-effectiveness for each unit by more than 20 percent. *See, e.g.*, 81 Fed. Reg. at 43904 (increasing incremental cost-effectiveness per ton for Huntington Unit 2 from $4,877/ton in the Proposed Rule to $6,368/ton (an additional $1,132/ton), 81 Fed. Reg. at 2048, Table 36). Because these cost increases are expressed in dollars per ton, they represent millions of dollars in increased costs.

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[10] *Compare, e.g.*, total capital costs from the Final Rule, 81 Fed. Reg. at 43903, Table 1 with the Proposed Rule, 81 Fed. Reg. at 2035, Table 14 (total capital investment for LNB/SOFA/SCR). *Compare also* Proposed Rule, 81 Fed. Reg. at 2039, Table 20; at 2042, Table 26; and at 2046, Table 32. Note also that several million dollars in total annual costs are also added for each unit in the Final Rule.

Contrary to its actions in the Final Rule, EPA may not simply forego an analysis of whether more than $80 million in new costs would impact the appropriateness of SCR as BART. This increase in capital costs substantially increased both the average and incremental cost-effectiveness of each unit. These substantial increases changed the reasonableness of whether such controls should be required, and thus the changed figures should have been subject to public notice and comment.

While courts give EPA deference in matters subject to its expertise, they have also explained that "[w]e are hesitant to rubber-stamp EPA's invocation of statistics without some explanation of the underlying principles or reasons why its formulas would produce an accurate result, particularly when the 'facts found' . . . demonstrate flaws in the formula." *Nat'l Ass'n of Clean Water Agencies v. EPA*, 734 F.3d 1115, 1145 (D.C. Cir. 2013). EPA's revised and much larger cost-effectiveness numbers, as well as much larger capital costs, should have caused EPA to seek public comment on the "reasonableness" of requiring such expensive controls, and to reject SCR as BART. PacifiCorp is likely to prevail on the merits of this issue.

III.B. PacifiCorp and Its Customers Will Suffer Irreparable Harm Without a Stay.

The compliance deadlines established in the Final Rule for installation of SCR place PacifiCorp in an untenable position. The installation of SCR at four units will be a massive construction effort requiring extensive planning, long-lead time engineering, and logistical coordination that will begin years before project completion and take several years to complete. PacifiCorp's estimated cost of SCR construction and installation at the four Utah BART Units is in excess of $700 million,[11] with a resultant increase in annual Operating & Maintenance costs in excess of $150 million per year.

No mechanism exists for PacifiCorp to recover from EPA the SCR development costs incurred if the Final Rule is found to be invalid. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) ("Imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.") (citations omitted). Therefore, such SCR development costs constitute "irreparable injury."

Finally, these SCR development costs are expected to be passed on to PacifiCorp's customers in the form of higher electricity rates, as EPA admits. In the rulemaking docket, EPA provides an estimate (utilizing its estimated costs, which are lower than expected by PacifiCorp) that installation of SCR at the Utah BART Units will result in 5-10% higher electricity rates for PacifiCorp customers. RH RTC at 370. Higher electricity rates could have an even broader adverse economic impact on the citizens of Utah, as businesses look to pass their higher costs through to their customers. Financial losses have been found to constitute irreparable injury "where no adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation." *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 555 (D.C. Cir.

[11] EPA claims costs of $517 million.

2015) (citations omitted). In addition, consideration of rate increases caused by EPA-mandated control equipment was one of several factors found to support the recent stay of a Regional Haze FIP in Texas. *See Texas v. EPA*, No. 16-60118 at *18, notes 40-42.[12]

Thus, irreparable harm will result from continuation of the current effective date for EPA's FIP for the Utah BART Units.

III.C. The Balance of the Equities and the Public Interest Tip in PacifiCorp's Favor.

Neither EPA nor the regional haze program's overarching "visibility goals" will suffer any irreparable harm from a stay. Congress identified the purpose of the regional haze program as setting and achieving goals to achieve "natural visibility conditions by the year 2064." *See* 40 C.F.R. § 51.308(d)(1)(i)(B). Even if EPA's FIP for NO_x BART is ultimately upheld, Utah is ahead of its reasonable progress goals, without imposition of the FIP. *See, e.g.*, Utah Div. of Air Quality, Progress Report for Utah's State Implementation Plan for Regional Haze (May 18, 2015) at F10-F11, F-62 ("Utah Progress Report"). As established by the most recent data in Utah's 5-year progress report to EPA, Utah is meeting and surpassing its long-term visibility goals for all Class I areas in Utah. Utah Progress Report at F10-F11. Further, Utah reported that "the State of Utah has determined that the current implementation plan elements and strategies are sufficient . . . to meet all established reasonable progress goals." *Id.* at F-62. The SIP referred to in the State's progress report did not include EPA's FIP SCR requirement.

Moreover, EPA has already admitted that Utah is making reasonable progress towards the applicable Clean Air Act requirements. 77 Fed. Reg. at 74367 (Dec. 14, 2012) ("the State [of Utah] met all reasonable progress requirements for the Class I areas in Utah"). Granting a stay does not impede visibility improvement because the Utah BART Alternative already is in place. Moreover, EPA does not even require the emissions reductions under its FIP until 2021. In the meantime, the status quo continues, with Utah's reasonable progress goals being exceeded. *See* Final Rule at 43924/40 C.F.R. § 52.2336(d)(1) (setting an August 4, 2021 compliance deadline for installation of SCR on the Utah BART Units).

Utah's regional haze SIP and its permits for PacifiCorp's facilities have required action to reduce emissions earlier than EPA's FIP. 81 Fed. Reg. at 2030 ("The reductions under the Utah BART Alternative are required . . . by August 2015 . . . and would provide an early and on-going visibility benefit"); 77 Fed. Reg. at 74367-68 (EPA has found that Utah "met all reasonable progress requirements for the Class I areas in Utah" and the "two BART-eligible plants in central Utah are projected to decrease SO_2 emissions by 13,200 tons and NO_x emissions by 6,200 tons between 2002 and 2018. The State also shows that in general the impact from sources in Utah is not significant" at Class I areas in neighboring states.). Many of the visibility benefits from the BART

[12] *See also* EPA-cited FIPs for Hawaii (77 FR 61478, 61488 (Oct. 9, 2012)); Navajo Nation (77 FR 51620, 51625-51626 (Aug. 24, 2012)); and Arizona Apache Generating Station (77 FR 72512 (Dec. 5, 2012), which EPA claims were situations where consideration of rate increases was an appropriate part of its BART analysis. RH RTC at 370, note 576.

Alternative are already being realized under Utah law, including the emission reductions from new control equipment and the shutdown of the Carbon plant (which were not contemplated when EPA made these statements). Thus even under a stay of EPA's FIP, the relevant Class I areas are still benefiting from these pre-FIP deadline emissions reductions required by the State's proposed RH SIP. This ensures that the Congressional objective for visibility improvement will not be inhibited even if EPA's FIP BART for NO_x is delayed or vacated.

An additional matter of public interest favoring a stay is the concentrated nature of employment impacts related to the Utah BART Units. In addition to higher costs of electricity for consumers, the compliance costs for the FIP may lead to the closure of facilities if PacifiCorp determines that the increased compliance costs do not justify continued operation of one or more units. The decision to shut units down or change to natural gas rather than install SCR has been a common result of EPA FIPs requiring SCR installation. *See, e.g.*, Arizona Apache Plant, 80 Fed Reg 19220 (Feb. 27, 2015) (originally requiring SCR through an EPA FIP but changing to natural gas in subsequent SIP revision); Arizona Cholla Plant, 81 Fed Reg 46852 (July 19, 2016) (same); Oregon Boardman Plant, 76 Fed. Reg. 38997 (July 5, 2011) (requiring SCR in original state submittal to EPA but replacing with BART Alternative that requires cessation of burning coal by 2020 and only LNB/modified OFA). Because the Utah BART Units are all located within a nexus of small rural communities, the employment impacts from closure of even one unit will be significant for those communities. Emery County has been designated as a "Mining Dependent" county by the Department of Agriculture. USDA, Economic Research Service, County Typology 2015, *available at* http://www.ers.usda.gov/data-products/county-typology-codes.aspx. As stated by a local county commissioner, "The economic impact of the Hunter and Huntington Power Plants is a large portion of our economy in Emery County. The economic impact Rocky Mountain Power has had to Emery County in direct and indirect is 800+ jobs." *Part I: Commissioner Brady speaks at EPA hearing on regional haze*, Emery County Progress, Feb. 2, 2016.

Importantly, the Regional Haze Statute and the Regional Haze Rule do not address matters of public health. *See, Texas v. EPA*, 2016 WL 3878180 at *19, note 42 (finding public health benefits are not relevant to a stay consideration). Instead, the purpose of the regional haze program is to remedy anthropogenic contributions to visibility impairment in Class I areas. *See* 42 U.S.C. § 7491(a)(1). Thus, delaying the effective date of the Utah RH FIP is not related to public health. The area where the Utah BART Units are located is attaining the National Ambient Air Quality Standards for all criteria pollutants. Impacts from a stay would not present the type of risks to justify compelling immediate capital projects of inordinate cost that will disrupt the State's economy and PacifiCorp's electric generating operations with little or no visibility benefits. *See*, e.g., *Tate Access Floors, Inc. v. Interface Architectural Res., Inc.*, 279 F.3d 1357, 1364 (Fed. Cir. 2002).

IV. Conclusion

If a stay is not entered, PacifiCorp will be forced to begin the planning, engineering and construction processes for SCR at the four Utah BART Units at significant cost. The actual costs of installing and operating SCR at the four units will approach one billion dollars, while EPA's projected improvement in visibility will be imperceptible at best, and actually lower than Utah's proposed BART Alternative. On the other hand, granting PacifiCorp's stay request will have no negative consequences on visibility while allowing well-justified further consideration of the Final Rule.

Based on the foregoing, EPA should grant PacifiCorp's Request for Reconsideration and Request for Administrative Stay.

Sincerely,

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cc: Blaine Rawson
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